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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: MAY 19 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Application for Advance Processing of Orphan Petition Pursuant to 8 C.F.R. § 204.3(c)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The District Director of the Miami, Florida Citizenship and Immigration Services (CIS) District Office denied the Application for Advance Processing of Orphan Petition immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant filed an initial Application for Advance Processing of Orphan Petition (Form I-600A) on June 6, 2003. Subsequent to the filing of the application, the applicant and her husband, [redacted] divorced. After the divorce, the applicant withdrew the application. On October 8, 2003, the 35 year-old applicant then filed a new Form I-600A as an unmarried citizen of the United States.

The district director denied the application because he found that during the adjudication of the applicant's initial Form I-600A, the applicant did not fully disclose her then spouse's criminal history. As an additional ground for denial, the district director found he could not make a proper determination of the applicant's mental status without the applicant's submission of a psychiatric evaluation.

The applicant, through counsel, files a timely appeal.

The first issue to be determined on appeal is whether the applicant failed to disclose her spouse, [redacted] arrests during the initial application and, if so, whether such failure results in a negative finding as to her credibility such that the application should be denied.

The record reflects that [redacted] was arrested on three separate occasions. His first arrest on July 8, 1994 for possession of cocaine resulted in a withheld adjudication.[1] A letter from [redacted] attorney, Alex Solomiany, indicates that the effect of a withholding of adjudication is that "the judgment of guilt is not entered by the judge." [redacted] further states:

> Under Florida law [redacted] is not a convicted felon although he was found guilty of the charges of possession of cocaine. [redacted] chooses, he would be eligible to "seal" his record. The effect of sealing a criminal history record is to keep the record confidential, and it allows the subject of the criminal history record to deny the arrest that was sealed. This information is found under section 943.059(4)(a) of the Florida Statutes.

Although [redacted] is eligible to "seal" his record, there is no evidence that he ever chose to do so. As [redacted] was arrested and found guilty of the charge of possession of cocaine, such criminal information is required to be revealed in order for CIS to properly adjudicate an application for advance processing of orphan petition.

The record also reflects that [redacted] was arrested on November 30, 1994 for driving under the influence and was found guilty of this charge on March 16, 1995. [redacted] license was suspended and he was placed on

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[1] Case number [redacted]; Circuit Court of the 11th Judicial Circuit, Dade County, Florida.

probation for six months.[2] The record further reflects [redacted] was arrested for a third time on January 18, 1996 for driving with a suspended license and was placed on work release for 60 days.[3]

The applicant states that she first became aware of her ex-husband's criminal background in April 2003, two months prior to filing the initial Form I-600A application. The applicant indicates that she knew the following about her husband's criminal background:

> I knew that he had been charged with a felony; that of driving under the influence of alcohol and having driven with a restrained license. He never told me he had had any problems with drugs (cocaine) . . . I would have never signed his citizenship application having known about his problems with drugs.

The applicant's statement indicates that she was aware of a felony charge against her husband, as well as charges for driving under the influence and driving with a suspended license. Based upon her statement it is clear that at the time of the interview with the home study preparer, the applicant was aware of M[redacted] previous criminal history.

The record contains the original home study prepared by [redacted] and [redacted] of Jewish Community Services of South Florida. While the home study does not indicate the date that it was prepared, it does state that interviews of the applicant and [redacted] occurred during June 2003. In the original home study there is no discussion of any of [redacted] arrests. The home study indicates that the applicant and [redacted] were asked by the preparer whether either of them had "ever committed any crimes (felony or misdemeanor), even if it did not result in an arrest or conviction." Both the applicant and [redacted] responded "no" to this question.

On appeal, counsel argues that at the time of this home study, the applicant did, in fact, disclose the facts of [redacted] arrests to the preparer. In a letter prepared by [redacted] in response to CIS' notice of intent to deny, [redacted] states that at the time of the interview [redacted] revealed his arrest history and the applicant provided copies of all of the available court records related to the arrests. [redacted] states:

> I knew from the first interview that [redacted] was arrested, yet was never convicted. Mr. [redacted] nor [the applicant] never withheld this information from me. [redacted] has always explained that he believes that he is not a convicted felon, that his attorney has cleared this situation to him repeatedly.

The regulations are clear that prospective adoptive parents must reveal any history of arrest or conviction. As indicated above, at the time of the interview with the home study preparer [redacted] had been arrested on three separate occasions, all of which the applicant admits she knew about. It is of no relevance in this case whether the applicant, [redacted] or [redacted] believed that [redacted] had ever been convicted of his 1994 charge for cocaine possession. The fact remains that applicants are required to disclose any history of arrest, regardless of whether the arrest resulted in a conviction.

There is no evidence in the record to substantiate counsel's claims that the applicant revealed [redacted] arrests to the preparer. The assertions of counsel and [redacted] that the applicant disclosed [redacted]

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[2] Case numbe[redacted] Circuit Court of the 11th Judicial Circuit, Dade County, Florida.

[3] Case numbe[redacted] Dade County, Florida.

arrest history are not substantiated by any corroborative evidence in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

We do not find it plausible for [redacted] to claim after the fact to have known about these arrests at the time she prepared the home study. As noted by the district director in his decision, if the preparer was aware of [redacted] criminal history, the information should have been addressed in the home study. Given that [redacted] subsequent letter provides no explanation or excuse for her failure to include the arrest information in the homestudy, despite her awareness of such arrests, we do not find it credible that the applicant and her husband informed the preparer of [redacted] criminal history.

Counsel also argues that CIS' focus on the withdrawn application is "misplaced" and "improperly penalizes [the applicant] for having once been married to someone who (by any objective measure) has a minor criminal history." We disagree with counsel; the facts related to the withdrawn application are clearly relevant to the instant application. We do not find that an applicant should be afforded a "clean slate" merely by getting divorced and filing a new application. The fact remains that the applicant was aware of her husband's previous history of arrests and failed to reveal such information to the preparer.

The regulation at 8 C.F.R. § 204.3(a)(1) states in pertinent part:

> Petitioning for an orphan involves two distinct determinations. The first determination concerns the advanced processing application, which focuses on the ability of the prospective adoptive parents to provide a proper home environment and on their suitability as parents. This determination, based primarily on a home study and fingerprint checks, is essential for the protection of the orphan. The second determination concerns the orphan petition, which focuses on whether the child is an orphan under section 101(b)(1)(F) of the Act. The prospective adoptive parents may submit the documentation necessary for each of these determinations separately or at one time, depending on when the orphan is identified. An orphan petition cannot be approved unless there is a favorable determination on the advanced processing application.

A petitioner is required to disclose all arrests, including those that have been expunged or removed from the petitioner's (or the petitioner's spouse's) criminal record. As noted in the regulations, a petitioner's failure to disclose an arrest or conviction, or history of domestic violence by the prospective adoptive parents to the home study preparer or to CIS may result in the denial of the advanced processing application or petition. 8 C.F.R. § 204.3(e)(2)(iii)(D).

It is noted that 8 C.F.R. § 204.3(e)(2)(iii)(D) permits, but does not require, denial of the application or petition on the basis of the applicant's or petitioner's failure to disclose an arrest or other adverse information. Whether to deny the petition, therefore, is a matter entrusted to CIS' discretion. The information required by 8 C.F.R. § 204.3(e)(2)(iii)(D), however, is essential to a proper decision on whether an applicant will provide proper care to an adopted orphan. For this reason, this office concludes that, although not mandatory, the denial of the advance processing application is the proper decision when the applicant has failed to make the required disclosures.

Counsel states that CIS' focus on "alleged inconsistent details misses the bigger picture" and argues the "focus of the I-600A process must and should be on the question of whether 'proper care will be provided for the orphan.'" While counsel acknowledges that there was a "lack of thoroughness and attention to detail exhibited by those involved in the application process, including [the applicant] herself and the initial home study preparers," counsel argues that such facts do not make the applicant deceptive or unfit to adopt.

We are not persuaded by counsel's argument. We do not find that the record establishes the applicant was forthcoming with information related to [redacted] arrest history. The details related to this lack of candor are part of the larger question as to whether proper care will be provided. Despite counsel's focus on Mr. [redacted] "minor" criminal history, CIS must be confident that it has all relevant information when making a determination as to whether an orphan will receive proper care. The applicant's lack of candor related to her ex-spouse's history calls into question other elements of the home study that are not verifiable by CIS.

On appeal, we note that the petitioner has submitted additional evidence related to the applicant's psychiatric evaluation. Specifically, the applicant provides a letter from [redacted] who states that he conducted a full psychiatric evaluation of the applicant and found her to be capable of proper care. Such evidence satisfactorily overcomes the second ground for denial stated by the district director.

However, because the record does not adequately establish that the applicant was truthful in her dealings with CIS, the petitioner has failed to overcome the objections of the director. It is determined that the evidence of record is not sufficient to establish that the applicant will provide proper care to an adopted orphan. For this reason, the application must be denied. 8 C.F.R. § 204.3(h)(2).

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has failed to meet the burden.

While the petitioner has not met that burden in this instance, we do not find that such a determination would prevent CIS from finding the applicant credible in a subsequent filing. The regulation at 8 C.F.R. § 204.3(h)(4) would prohibit the approval of any new Form I-600A application filed within one year.

ORDER: The appeal is dismissed.